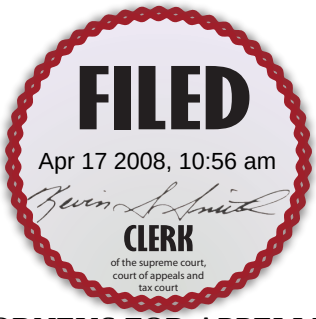

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IN THE COURT OF APPEALS OF INDIANA

A CHILD'S WORLD,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 93A02-0708-EX-755
	)	
REVIEW BOARD OF THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT and MELISSA HODDE,	)	
	)	
Appellees.	)	

APPEAL FROM THE REVIEW BOARD OF THE DEPARTMENT OF WORKFORCE DEVELOPMENT
Cause No. 07-R-1825

April 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent A Child's World appeals the decision of the Review Board of the Department of Workforce Development (the Board) affirming an Administrative Law Judge's (ALJ) determination that Melissa Hodde, a former employee of A Child's World, is entitled to unemployment compensation. A Child's World argues that the Board erroneously refused to consider certain supplemental evidence and rendered a judgment that was not supported by the evidence. Finding no error, we affirm.

FACTS

A Child's World is a daycare center in Indianapolis and from February 13, 2006, until March 6, 2007, Hodde was employed at the center as a childcare provider. Hodde worked with toddlers from the ages of twelve to eighteen months. State regulations limit child-to-staff ratios such that up to ten toddlers may be in one group with two caregivers and up to eight infants may be in one group with two caregivers. Appellant's Br. p. 2.

On March 6, 2007, the assistant director of the center asked Hodde to add an infant to the toddler room in which Hodde was working. Hodde refused, and she maintains that her refusal was based on her understanding that the addition of the infant would have caused the room to exceed the applicable ratio. The director of the center, Amanda Williams, became angry when Hodde and her co-teacher refused to accept the infant in their classroom. Williams instructed Hodde and the other employee to leave the center and threatened to call the police if they refused to do so. Williams did not say anything about returning to work the

next day. Although Williams contends that she merely sent the employees home for the rest of the day to cool down, Hodde understood that she had been fired. Thus, she did not return to work the following day.

At some point, Hodde filed for unemployment benefits, initially arguing that she voluntarily left her employment with good cause. A Child's World contested her eligibility for benefits, contending that Hodde did not have good cause to quit. At the June 11, 2007, hearing before the ALJ, Hodde argued for the first time that she had been fired without good cause. The ALJ then explained that "a discharge is not on the notice of hearing so . . . the employer is entitled to ten days notice . . . ." Tr. p. 36. The ALJ then asked A Child's World if it would like to continue the hearing for ten days so that it could adequately prepare a response to a discharge argument. A Child's World agreed to waive the notice requirement and elected to proceed with the hearing as scheduled. Id. at 37. On June 14, 2007, the ALJ found Hodde eligible to receive unemployment benefits:

> . . . The [ALJ] finds that there was a dispute between the employer and the claimant regarding the addition of an infant child to the toddler daycare room that the claimant was attending. The claimant maintains that the addition of the infant would have caused her room to have a higher than permitted child/caregiver ratio under state law. The employer denies this. The [ALJ] makes a credibility determination and finds that the employer is not credible on this issue. The [ALJ] finds that the employer became angry at the claimant [b]alking at admitting the child to her room. The [ALJ] finds that the owner and the director of the facility told the claimant and another employee . . . to leave the premises or the police would be called to remove them. The employer maintains that it merely sent the employees home for the rest of the day in order to cool down. The claimant and [the other employee] believed that they had been discharged after being told to leave at the risk of being ejected, without any instruction to return the next day. The [ALJ]

> finds the employer[']s testimony on the discharge issue not to be credible. The [ALJ] finds that the claimant was discharged.
>
> CONCLUSIONS OF LAW: The [ALJ] concludes that the claimant was discharged, but not for just cause. . . . [T]he [ALJ] concludes that the employer has failed to meet its burden of proof on the discharge issue. The [ALJ] concludes that the claimant was discharged without just cause. The [ALJ] concludes that the employer's testimony that the claimant was not discharged is contrary to the evidence.

Appellant's App. p. 16-17 (emphases added).

A Child's World appealed to the Board and sought leave to submit supplemental evidence that had not been submitted to the ALJ. The Board refused to accept the supplemental evidence. On August 1, 2007, the Board summarily affirmed the ALJ's decision. A Child's World now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The Indiana Unemployment Compensation Act provides that "[a]ny decision of the review board shall be conclusive and binding as to all questions of fact." Ind. Code § 22-4-17-12(a). The statute also includes a provision for judicial review when the Board's decision is challenged as contrary to law, specifying that the reviewing court is limited to a two-part inquiry into "the sufficiency of the facts found to sustain the decision and the sufficiency of the evidence to sustain the findings of facts." I.C. § 22-4-17-12(f). "Under this standard courts are called upon to review (1) determinations of specific or 'basic' underlying facts, (2) conclusions or inferences from those facts, sometimes called 'ultimate facts,' and (3) conclusions of law." McClain v. Review Bd. of the Ind. Dep't of Workforce Dev., 693 N.E.2d 1314, 1317 (Ind. 1998).

Review of the Board's findings of basic fact are subject to a substantial evidence standard of review. In applying this standard of review, we neither reweigh the evidence nor assess the credibility of witnesses and will consider only the evidence most favorable to the Board's findings. Id.

The Board's conclusions as to ultimate facts involve an inference or deduction based on the findings of basic fact and are appropriately characterized as mixed questions of law and fact. Id. at 1317-18. They "are typically reviewed to ensure that the Board's inference is 'reasonable' or 'reasonable in light of [the Board's] findings.'" Id. at 1318 (quoting KBI, Inc. v. Rev. Bd. of the Ind. Dept. of Workforce Dev., 656 N.E.2d 842, 846-47 (Ind. Ct. App. 1995)). Some questions of ultimate fact are within the special competence of the Board and in reviewing such questions, we should exercise greater deference to the reasonableness of the Board's conclusion. McClain, 693 N.E.2d at 1318. Our Supreme Court summed up the standard as follows:

> basic facts are reviewed for substantial evidence, legal propositions are reviewed for their correctness. The best that can be said for ultimate facts or "mixed questions" as a general proposition is that the reviewing court must determine whether the Board's finding of ultimate fact is a reasonable one. The amount of deference given to the Board turns on whether the issue is one within the expertise of the Board.

Id.

II. Supplemental Evidence

A Child's World first argues that the Board erred by refusing to consider supplemental evidence proffered by the center in its appeal of the ALJ's determination. The Board may base its decision entirely on a record made before a referee or ALJ. Jack's Wholesale Windows v. Rev. Bd. of Ind. Dep't of Workforce Dev., 816 N.E.2d 506, 512 (Ind. Ct. App. 2004). "When that occurs, there is a presumption that the parties were given an opportunity during those prior proceedings to fully litigate the dispositive issues, which would include the opportunity to present all evidence relevant to whatever factual questions must be resolved." Id. The Board has discretion to deny a request for a new hearing based on new evidence if the party seeking to offer the evidence fails to present a good reason for the failure to present the evidence at the original hearing. Best Lock Corp. v. Rev. Bd. of Ind. Dep't of Emp. and Training Servs., 572 N.E.2d 520, 528-29 (Ind. Ct. App. 1991); cf. Jack's, 816 N.E.2d at 513-14 (holding that the Board should hear additional evidence when a party was surprised by allegations made at the ALJ proceeding for the first time that the party could not have reasonably anticipated).

Here, A Child's World sought to introduce evidence regarding a visit from a state inspector that occurred on the day involving the Hodde incident. A Child's World argues that the inspector's report establishes that there were no violations of child/staff ratios on that day. The center does not even attempt, however, to explain why it failed to offer this evidence at the original hearing before the ALJ. It may not rely on its alleged surprise that Hodde claimed for the first time at the hearing that she had been discharged without cause,

inasmuch as it agreed to waive notice and proceed with the hearing as scheduled. Tr. p. 36-37. Under these circumstances, we find that A Child's World has not presented a good reason for its failure to present the evidence at the hearing before the ALJ. Additionally, the center has failed to establish that it was surprised by allegations made at the ALJ proceeding for the first time that it could not reasonably have anticipated. Thus, the Board did not abuse its discretion by refusing to consider the supplemental evidence.

III. The Determination

A Child's World also argues that the Board's conclusion that Hodde was discharged without good cause is not supported by substantial evidence. The Board's decision was based on Hodde's testimony that she refused to accept an infant into her room because it would have caused them to have exceeded the proper ratio and that, after she refused, her employer became angry, ordered her to go home in the middle of the workday, threatened to call the police to escort her off of the premises, and gave no instructions regarding a return to work the following day. Although representatives of A Child's World offered a different version of events and their own interpretations of the incident, the ALJ and the Board found Hodde to be the more credible witness.

A credibility determination is a finding of fact. Russell v. Rev. Bd. of the Ind. Dep't of Emp. and Training Servs., 586 N.E.2d 942, 946 (Ind. Ct. App. 1992). "To make an accurate credibility assessment based on demeanor one must be in a position to observe the witnesses as they testify." Stanley v. Rev. Bd. of the Ind. Dep't of Emp. and Training Servs., 528 N.E.2d 811, 815 (Ind. Ct. App. 1988).

As the reviewing court, we are not permitted to second guess the ALJ's and the Board's analysis of witness credibility. Thus, we accept their finding that Hodde's version of events is more credible, necessarily meaning that we also accept their conclusion that she was discharged and did not leave her employment voluntarily.[1] Similarly, we find that the Board's conclusion that Hodde was discharged without just cause is supported by evidence establishing that (1) she refused to permit an act that would have caused the center to be in violation of state law, and (2) she reasonably inferred from her employer's threat to call the police to escort her from the premises that she was being fired at that time; thus, (3) she reasonably failed to show up at work the following day. Therefore, we find no error in the Board's decision finding that Hodde was discharged without good cause and thereby eligible for unemployment compensation.

The judgment of the Board is affirmed.

RILEY, J., and ROBB, J., concur.

[1] A Child's World argues that the Board erred by failing to enter findings of fact as to whether Hodde voluntarily quit without good cause. By finding that Hodde was discharged, the Board implicitly also found that she did not leave her employment voluntarily. The Board was not required to make an explicit finding on the issue and we do not find error on this basis.